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SUPREME COURT, U.S.

No. 79-6740

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT BULLINGTON,
Petitioner

v.

STATE OF MISSOURI,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

SUPPLEMENTAL BRIEF FOR THE RESPONDENT, STATE OF MISSOURI

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Comes now the Respondent, State of Missouri and files its Supplemental Brief pursuant to Rule 35.5 to analyze the present case in light of this Court's decision in United States v. DiFrancesco, ____U.S.____, 49 U.S.L.W. 4022 (1980).

This Court, in U.S. v. DiFrancesco, held it permissible for the Government to appeal sentences under 18 U.S.C. §3576. In rejecting the defendant's Double Jeopardy claim that the imposition of sentence is an implied acquittal of any greater sentence, the Court stated that there exists a fundamental difference between a sentence and an acquittal and accordingly recognized that a sentence did not possess the qualities of constitutional finality found in an acquittal. 49 U.S.L.W. at 2047. The Court, in reaching its conclusion, relied in part on the rule of North Carolina v. Pearce, 395 U.S. 711 (1969) that the propriety of an increased sentence on retrial is "a well-established part of our constitutional jurisprudence." Id at 4027, 395 U.S. at 720. SEE CHAFFIN v. STYNCHOMBE, 412 U.S. 17, 24 (1973).

Respondent does not contend that the decision in DiFrancesco is controlling of the situation at bar, however the principles enunciated are instructive. The Court here, as in DiFrancesco, is faced with the claim that the Double Jeopardy Clause gives the imposition of sentence a stamp of constitutional finality. As in DiFrancesco, this Court must reject such a proposition. The pronouncement of sentence has historically never carried the finality that attaches to an acquittal nor has this Court in any of its decisions ever adopted such a proposition. 49 U.S.L.W. at 4027. Indeed, this Court has held just the opposite. Id, NORTH CAROLINA v. PEARCE, 395 U.S. at 720, CHAFFIN v. STYNCHOMBE 412 U.S. at 24.

Similarly instructive is this Court's recognition in DiFrancesco that the imposition of sentence is not an "implicit acquittal" of any greater sentence. Id at 4027. This contention is however put forth by the petitioner in this cause. Petitioner contends that the imposition of a life sentence constitutes an acquittal of the greater sentence, death. SEE PETITIONER'S BRIEF at 16 et al. The rationale of DiFrancesco rejects such an approach. Petitioner's assertion that bifurcation and its adversarial nature differentiates this case from DiFrancesco is an "exaltation of form over substance which should be avoided."[1] Not only does this misinterpret the purpose of bifurcation, it seeks to extend Double Jeopardy finality to the imposition of sentence. SEE RESPONDENT'S BRIEF AT 12-13.

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1. While this Court in DiFrancesco did state that much of the sentencing is the result of non-adversarial inquiry, the Court did not state nor imply that sentencing is wholly non-adversarial. Id at 4028.

Respectfully submitted,

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This is to certify that a copy
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